No. 11062.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED LLOYD SAUNDERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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Preliminary.

Appellant appeared in *Propria Persona* in the District Court and also in the United States Circuit Court of Appeals for the Ninth Circuit. By substitution, appellant is now represented by counsel above, who present this Petition for Rehearing.

To the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, and the Judges Thereof:

Appellant, above named, presents this, his petition for rehearing, and respectfully prays that the opinion of this Honorable Court, filed April 5, 1946, and the judgment of the court, entered pursuant thereto, be withdrawn and

vacated and that judgment be entered herein reversing the decision and judgment of the United States District Court for the Southern District of California and adjudging appellant not guilty of the crime charged.

As grounds for this petition, appellant urges:

1. This Court overlooked the application to this case of the recent *Estep* and *Smith* (*Estep v. United States* (No. 292) ..... U. S. ....., decided February 4, 1946) decisions of the Supreme Court of the United States in that in actuality an issue of arbitrary and discriminatory classification is involved herein.

2. As to the grounds of appeal 3 and 4, each of which is hereby incorporated herein by reference to page 50 of the record, this Court overlooked uncontroverted facts of record, the clear and express provisions of the Selective Training and Service Act and well established principles of law applicable thereto.

ARGUMENT.

This case involves denial of due process by the Local Draft Board and a refusal by the trial court to consider and review the resulting jurisdictional question.

Both the appellant's artless *Propria Persona* presentation of his testimony to the trial court and in his briefs and argument to this Court failed to develop and point up his true position. The record, nevertheless, justified and supports it.

I.

The Trial Court Erred in Failing to Recognize That the Case Involved a Question of Arbitrary Action by the Local Board, and Erred in Refusing to Review Said Action.[1]

Although the appellant generously credited the local board with sincerity and good motives in its classification of him [R. 36 and as quoted in this Court's opinion], the Record actually shows arbitrary and discriminatory action by the local board in that all the evidence before the board supported appellant's claim to a IV-E (conscientious objector's) classification. The trial court therefore erred in refusing to consider the evidence and to adjudge it arbitrary and discriminatory. Although the entire file of the draft board was admitted in evidence and the appellant was permitted to relate his testimony in full the trial court obviously felt bound not to consider it and did not consider it.

> "The Court: Well, the difficulty of the situation is that the Court has no power to review classifications of the Draft Board" [R. 38].

Again,

> ". . . I, as a Judge of the United States District Court, have no right, no power, under the law, to

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[1]The identical point arose in the recently argued case of *Berman v. United States*, No. 10953. The Court has not yet announced its decision in the *Berman* case. The appeal was heard by this Court *en banc*. We respectfully submit the *Berman* and instant cases are indistinguishable on this point.

> review that action of the Draft Board, provided it shows on its face that the regular administrative processes were carried out. In this proceeding I haven't any choice." [R. 42.]

Again,

> ". . . I could ignore that testimony entirely and just take the Record and your statement, and as a matter of law I have no choice, you still, technically, are guilty under the law." [R. 43.]

What did the Court have in mind by the phrase "as a matter of law?" [R. 43.]

At the time the trial court spoke the *Falbo* case (*Falbo v. United States,* 320 U. S. 549) was generally considered the embodiment of the governing principles relative to review. Practically all United States Judges agreed. In the Supreme Court's *Estep* decision, Mr. Justice Frankfurter's anguished comment in his separate opinion well summarizes the current attitude: "Such has been the construction of more than forty judges in the Circuit Courts of Appeal . . . have ruled that judicial review of a draft board classification is not available in a criminal prosecution, even though the registrant has submitted to the preinduction physical examination."

The trial court, while otherwise scrupulously and courteously fair to appellant, used the current, legal yardstick in delimiting his power. This we now know was erroneous. In short, the District Judge failed to review the evidence to determine whether there is "a basis in fact for the classification which it (the Board) gave the registrant," as required by the *Estep* case (Pamphlet opinion, p. 7). (See footnote 14 in *Estep* opinion.)

II.

The Local Board Made an Error of Law That the Trial Court Should Have Recognized and Corrected by a Judgment of Acquittal.[2]

The appellant, to corroborate his asserted claim to a conscientious objector's classification testified he had presented to the board a personal course of action consistent with and in support of his claims. This was briefly, but well summarized by the trial court:

> "The Court: And that you showed your conscientious objector's viewpoint when you were originally classified, by filing a conscientious objector's form; that you substantiated that position when you refused to accept the discipline of the Army and spent some seven months in the guardhouse, when all you had to do was to accept a noncombatant status in the military forces and work in the hospital?
>
> The Defendant: Yes." [R. 41.]

The attitude of the draft authorities, and the Government's attack on his position, was that a non church member could not qualify under the terms of the Selective Training and Service Act of 1940 requiring "religious training and belief." The cross-examination of appellant covered only the single point of appellant's not belonging to any Church! [R. 39, 40.]

At the close of this single-point cross-examination the Court restated the appellant's position (and indirectly

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[2]This point, too, is discussed fully in the briefs filed in this Court in the *Berman* case, No. 10953.

summarized the basis of the denial of appellant's claim to a conscientious objector's classification), thus:

> "The Court: That statement is predicated upon this thought, as I understand it: You believe that a man may be a conscientious objector within the meaning of the Congress when it passed the Selective Service Act and provided for such classification, regardless of the fact that he is not a Jehovah Witness, or a Presbyterian, or a Catholic, or a Quaker, or belongs to any other organized church; that he may be just as good a conscientious objector without belonging to any organized group? So far that is your position?
>
> The Defendant: Yes." [R. 41.]

At the conclusion of this restatement of appellant's position the court declared itself powerless "as a matter of law" [R. 43]. It is to be noted that the trial court willingly agreed to ignore the F. B. I. testimony as not necessary to a determination of the case [R. 43], but it must be remembered that the only possible adverse evidence to the claim and the evidence of appellant for a IV-E classification, were the fragments of the F. B. I. investigatory reports presented to the Hearing Officer, and if his recommendation and the final decision of the Appeal Board can be said to have any support at all it rested on this F. B. I. "evidence." Our present argument, however, is not that there was no evidence whatever to support the classification but that the classification was made on the basis that a registrant, no matter how demonstrably sincere, was not entitled to a conscientious objector's classification if he did not belong to a Church. We submit this action of the draft board was based on an erroneous interpretation of the law.

The selective service authorities construed the phrase in the Act "by reason of religious training and belief" literally. It has been held, in a well reasoned opinion (*United States v. Downer,* 135 F. (2d) 521) that the origin of a scruple against participating in war could be philosophical and the registrant need not belong to a church. In the *Downer* case the circuit court reversed the district court, holding that a misconstruction of the Act of such a nature was an error of law.

Conclusion.

WHEREFORE, appellant prays that the order and judgment heretofore entered herein affirming the judgment of the court below, be set aside and held for naught, and that this petition for rehearing be granted and the court render an order reversing the judgment of the court below. Appellant prays for such other and further relief to which he may show himself justly entitled in the premises.

Respectfully submitted,

A. L. WIRIN and
J. B. TIETZ,

By J. B. TIETZ,

Attorneys for Appellant Alfred Lloyd Saunders.

Certificate.

I, the undersigned counsel for appellant, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

J. B. TIETZ.